



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

**EVALUATION OF THE PHASE I CONSTRUCTION
STORM WATER COMPLIANCE and
ENFORCEMENT PROGRAM**

Office of Enforcement and Compliance Assurance Response

The discharge of storm water runoff from construction activities (e.g., land development, road construction) can have a significant impact on rivers, lakes, and wetlands. Construction alters natural landscapes. During construction, earth is compacted, excavated and displaced, and vegetation is removed. These activities increase runoff and erosion, thus increasing sediment transported to receiving waters. In addition to sediment, as storm water flows over a construction site, it can pick up other pollutants like debris, pesticides, petroleum products, chemicals, solvents, asphalts and acids which may also contribute to water quality problems.

Sediment/siltation is listed in the *National Water Quality Inventory: 2000 Report* as the second leading cause of impairment in assessed rivers and streams, the third leading cause of impairment in assessed lakes, ponds and reservoirs, and the leading cause degrading wetland integrity. Construction sites are one source of sediment loading. Construction is specifically listed as the second leading *source* of pollutants degrading wetland integrity.

Ten industrial categories are specifically required to apply for and comply with NPDES permits to control their discharges involving storm water runoff. Construction activity that disturbs 1 or more acres is one of these categories. The primary method to control storm water discharges is through the use of best management practices as specified in these permits. Construction sites of 5 or more acres have been required to obtain an NPDES permit and install controls to prevent pollutants from leaving these sites for over ten years.

EPA and the states have spent years educating the regulated community. Compliance assistance efforts have included numerous training opportunities, storm water Web sites, public service announcements, guidance documents, fact sheets, brochures and model Storm Water Pollution Prevention Plans.

OECA first designated storm water as a priority area in the FY 1998-1999 Memorandum of Agreement (MOA) Guidance. Storm water will continue as an MOA priority in FY 2005-2007.

We intend to focus our efforts on large-scale developers where there is a company-wide pattern of non-compliance. These developers fall into two categories of large-scale construction operations: (1) commercial development of "big-box" stores and their associated contractors, and (2) large national residential builders.

In 2004, EPA initiated an independent evaluation of OECA's construction storm water program for sites of 5 or more acres to gauge the effectiveness of the program. Overall, the evaluation found this program to be generally sound, but also identified opportunities for improvement. Provided below are EPA responses to each of the recommendations set forth in the evaluation.

Overarching Recommendations

1: Develop Information Systems that Provide Reliable Data Regarding Construction Storm Water Compliance:

–Much of the information is collected at the level of the overall NPDES program and does not readily facilitate analysis at the priority-specific level.

–Inspectors do not appear to be collecting and recording information from the Inspection Conclusion Data Sheets.

–OECA should adjust existing data systems to track priority-specific efforts and progress.

OECA believes that reliable data is essential to measuring and reporting on construction storm water compliance. The actions that OECA is taking and plans to take over the next few years will improve the data system and make the data more reliable.

The evaluation recommends that OECA should consider adjusting existing data systems to track priority-specific efforts and progress. In fact, OECA's current system Integrated Compliance Information System (ICIS) is equipped with National Priority data fields and a Regional Priority data field. However, populating these data fields is optional in the ICIS system and EPA Regions have not consistently been providing this data. OECA has been working to correct this problem. In 2004, senior regional managers were alerted to this issue. OECA required that Regions report and certify this data point for end of year 2004. The requirement of reporting and certification of this data point will continue in FY 2005. Substantial additional data on enforcement and compliance activities under National Priority areas will be reported beginning in FY 2005.

Additionally, in December 2005, EPA expects to release the modernized system of Permit Compliance System (PCS), ICIS-NPDES, providing additional functionality for tracking and reporting activities under the wet weather areas, including construction storm water. However, only inspection and enforcement actions will be required to be entered into ICIS-NPDES as they occur rather than requiring an inventory because of the size and transiency of the construction storm water universe. An Interpretive Rule, revising the PCS Policy Statement, will establish the required data elements (Water Enforcement National Database (WENDB)), including elements for each wet weather area. The last release of ICIS-NPDES is scheduled for June 2007.

The evaluators observe that PCS contains no definition for "Significant Noncompliance" (SNC) for wet weather violations. OECA agrees that a definition for wet weather SNC would help in analyzing non-compliance in the sector and has already initiated development of a

definition for SNC for the storm water program. The revised draft is due Fall/Winter 2005, timed to coincide with an Interpretive Rule, which is expected to be completed by December 2005.

2: Consider Developing Realistic Performance Measures with the Regions based on Available Resources and a Multi-Year Strategy: *Work with Regions to develop a collaborative strategy that incorporates regional input from the outset and links intended outcomes to program inputs.*

OECA agrees that participation by Regions in developing multi-year strategies and setting storm water priorities taps into a powerful knowledge and experience base. The development of collaborative performance measures that incorporate Regional input from the outset, as recommended by the evaluation, serves the program in developing realistic performance measures that are watershed- and sector-specific. OECA's national priority strategy development process has been organized to collaboratively develop multi-year strategies with realistic goals.

OECA's new processes for planning and for developing strategies to implement OECA's Strategic Plan 2003-2008 will address this recommendation. In September 2003, the Strategic Plan was finalized. This plan includes the storm water program and is the result of a collaboration between Headquarters and Regions. It reflects a new perspective on OECA's work and a sharpened focus on achieving measurable environmental results. The plan is structured around five new goals, one being Clean and Safe Water. This plan has been further refined for FY 2005-2007 with the development of performance-based strategies for OECA's national priorities, including storm water compliance and enforcement. The Performance-Based Strategy for Storm Water was developed with extensive Regional and Headquarters collaboration and was led by senior regional managers. These Strategy Implementation Teams, composed of senior headquarters and Regional managers, developed performance measures associated with the strategic goals and objectives. Regional comments were solicited on many occasions.

As a result, OECA believes that the measures for the program as outlined in the strategy are realistic. The outcome measures in the Performance-Based Strategy for Storm Water are linked to the program inputs. For example, the regions are asked to target a certain percentage of storm water inspections, compliance assistance, and enforcement activities toward priority sectors or watersheds, or environmental justice areas. The measures that are directly linked to this particular program input include tracking the number of inspections, compliance assistance activities and enforcement activities in priority sectors or watersheds.

In the evaluation, some Regions expressed frustration that the Wet Weather National Priority Strategy was developed with little perceived involvement from Regions. These views are not supported by the facts of how the Wet Weather Priority Strategies were developed. Senior regional managers headed up each of the four Strategy Development Teams. The stormwater strategy development team was chaired by the Enforcement Division Director from Region 6, and managers from Regions 4, 8, and 9 participated on the team. In addition, the draft strategies for all the priorities were shared via e-mail with Regional managers and were discussed at the national enforcement conference in Orlando in June 2004. OECA's process explicitly called for this Regional involvement because OECA believes that this involvement

was and is crucial.

Level of Compliance

3: Work with Local Regulators to Improve Data on the Number of Regulated Construction Sites: OECA should work with local regulators keeping records of the number of building permits issued to identify universe of sites.

OECA agrees better data on the regulated universe would be ideal. However, with an estimated universe of 380,000 Notices of Intent filed for construction starts over 1 acre per year (snapshot figure from 2001), tracking costs may be prohibitive. OECA is exploring the feasibility of developing compliance rates using information provided by state and local regulators.

4: Provide States with an Adaptable Electronic NOI Database System: Work with OW to provide States with a platform for the electronic NOI database system.

OECA agrees that EPA's eNOI system seems very useful to applicants, local government officials, and other users. The Notice of Intent database consists of the notices filed by construction operators intending to be covered under the general permit applicable to Phase I (5 acres of land or greater) and Phase II (more than 1, but less than 5 acres of land) construction operators. OECA understands that the Office of Water (OW) has received numerous requests from states to support eNOI capabilities, including direct access to EPA's existing eNOI system or to develop a modular stand-alone system that can be distributed to states electronically for adaptation to state-specific requirements (and operated at the state level). OW is working with these states to identify acceptable solutions.

Key Strategies and Policies

5: Consider a Multi-Year Approach to Storm Water Strategies that Contains Realistic Measures of Performance: Disseminate strategies in stages and allow implementation time before a new strategy is issued with updated priorities.

EPA agrees that a multi-year strategy that contains realistic measures of performance is important. OECA's new performance-based strategy, developed as a result of EPA's strategic planning process, is a multi-year strategy that will provide continuity for the program. The Performance-Based Strategy for Storm Water references the 2003 Storm Water Compliance and Enforcement Strategy, issued by OCE, and builds on it – it includes a description of the environmental problem to be addressed, goals to be met, strategies for reaching these goals, and measures to track progress toward these goals. For example, the Performance-Based Strategy for Storm Water specifically includes measures (e.g., environmental benefit, compliance monitoring, compliance assistance, capacity building, and enforcement) to evaluate progress toward meeting the overall goals of the Strategy. The Strategy was developed with active Regional participation.

6: Revise ESO Policy and Develop a Communication Strategy: OECA should develop a communication strategy to address diverse expectations held by Regions and industry.

OECA's "Expedited Settlement Offer Program for Storm Water (Construction)" memo

signed by John Peter (JP) Suarez, then Assistant Administrator of OECA, on August 21, 2003 (Storm Water ESO Policy) has been well received by both EPA implementers and many parts of the construction industry. OECA is in the process of revising the Storm Water ESO Policy based on lessons learned during the pilot period and expects to have the revision finalized soon. The Storm Water ESO Policy commits OECA to conduct periodic assessments of the regional ESOs to maintain the uniformity of the nationally-implemented criteria and penalty schedules.

OECA agrees that communication about the ESO to the regulated community is important. According to the “Use of Expedited Settlements to Support Appropriate Tool Selection” memo signed by JP Suarez on December 2, 2003, the regions should provide up-front outreach and compliance assistance prior to using an expedited settlement tool by one or more of the following measures: (1) compliance assistance workshops; (2) compliance assistance communication networks; or, (3) distribution of compliance assistance materials.

The recommendation also mentions that periodic assessments to evaluate and report on the ESO’s ongoing effectiveness require having data systems that allow reporting of ESO actions independently of other enforcement actions. EPA agrees. In fact, ICIS has the capability to specifically track expedited settlements for storm water construction.

7: Track Overall Progress through Use of National Water Quality Inventory Reports or other Monitoring Data about Watershed Impairments: OECA should track water quality trends, particularly in areas of rapid development

OECA’s national Performance-Based Strategy for Storm Water is based on both a sector and watershed approach. The focus is, in part, on activities in priority watersheds that will help minimize the discharge of polluted storm water to surface waters. As a result, OECA agrees with the importance of linking compliance and enforcement activities to water quality and would like to explore, with OW, the possibilities relating to this recommendation.

OECA understands that OW supports this suggestion. Key to this effort will be identifying appropriate candidates for evaluation where site activities can be linked to long-term water quality improvements or degradation. EPA will need to evaluate what sources of data are most appropriate to use and how water quality and growth and population information will be interpreted.

Compliance Assistance

8: Invest in In-Person Compliance Assistance Efforts with Contractors and Field Staff: In-person efforts would provide greater learning opportunities, such as classroom training that includes a field component or an educational video that demonstrates good and bad storm water BMPs.

EPA recognizes the importance of effective compliance assistance. Intuitively, tailored personal assistance provided on an individual basis seems likely to improve individual operator compliance, and sector compliance as a whole. However, given OECA’s limited resources and the diverse jurisdictions responsible for regulating the construction storm water industry, this approach is not realistic. Additionally, EPA would be competing with other assistance providers

(states, trade associations, contractors, private sector, etc). This could undercut established providers and would be very difficult to implement from the federal level outside of the unauthorized states since it would need to be modified to accommodate state regulations and permits. Builders comply with national building codes that have been interpreted at the local level in a similar fashion. Recommendation 10 is more realistic in encouraging EPA to work with states and locals to improve their outreach.

OECA has prepared a model slide show on common compliance problems at construction sites for use by EPA staff who have been available upon request to make presentations on stormwater compliance (publicly available at www.epa.gov/compliance/resources/publications/civil/programs/wwrefmaterials.html). While OECA supports some direct compliance assistance through various stormwater workshops and EPA's assistance efforts in unauthorized states and territories, its role is primarily as a wholesale compliance assistance provider.

OECA is also embarking on two pilot efforts aimed at getting compliance assistance materials into the hands of the construction industry. These include promoting the use of post-inspection letters to construction sites that are inspected by EPA. The letters will include specific references to compliance materials and a dedicated stormwater compliance website that will help site owner/operators comply. Because the references are made in the context of an inspection, the site owner/operators should be particularly motivated to make positive changes and come into compliance. The second approach, which is also described under recommendation 10, involves working with state and local governments to create compliance assistance packages designed by and for distribution through state and local government officials. The assistance package may take the form of a CD-ROM that includes such things as EPA's soon to be completed Storm Water Pollution Prevention Plan (SWPPP) Preparation Guide, outreach brochures and a template or locator tool that allows state and local governments to site their specific additional or different regulations. This effort will also include guidance material to help field staff who would be distributing the materials at the local level to better understand the intent and content of outreach documents.

9: Develop Flexible Compliance Assistance Materials that are Easily Adaptable for State and Local Needs: *Work with States to develop flexible compliance assistance materials that can be easily adapted to local use for special conditions relating to impaired water bodies or regional considerations.*

OECA agrees that flexible compliance assistance materials for State and local use are important and has several available materials. Currently states can copy and modify compliance assistance material in both the Compliance Assistance Clearinghouse and the "More Resources" section of the Construction Industry Compliance Assistance Center (CICA) web site. One resource available on the CICA website is "Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development (the MYER Guide)" published by EPA's Office of Compliance. This assistance tool reflects significant input from stakeholders and is a product of joint effort by the industry, states, other federal agencies, non-governmental organizations, and EPA. It is designed to help the construction industry understand which

environmental regulations apply to them. OECA's funding of CICA enabled the creation of the Storm Water Resource Locator that draws users to the state and local level web-based resources.

OECA and OW are also compiling a compliance assistance package of existing and soon to be published construction stormwater assistance material for wide distribution at the state and local level. Before distribution, EPA will seek review by state and local personnel to see how to best present the materials and to put it in formats that will direct readers via web links to state and local requirements and to enable local governments, trade and professional organizations to easily modify select items to include local regulations and contacts.

Other compliance assistance materials are currently under development. OECA plans to conduct surveys to develop some measure of effectiveness of the tools developed and the effectiveness of delivery mechanisms. The Compliance Assistance Conclusion Data sheet (CACDS) is almost finalized and will allow compliance assistance providers to capture information regarding the impact that compliance assistance materials are having on-site. The Storm Water Audit Protocol is almost complete. This tool will address issues raised about clarifying the responsibilities of individuals at construction sites and for self inspection forms.

10: Modify Delivery of Compliance Assistance Materials to Fit within Existing Local Permitting Networks Familiar to Construction Industry: *Build on model of local officials handing out storm water compliance assistance materials and requiring that construction operators provide evidence of a storm water permit.*

OECA agrees that effective delivery of compliance materials is imperative. OECA will consider providing national support for such an approach. This could be integrated into the commitment made in its National Performance-Based Strategy for Storm Water. The Strategy already calls for OECA to explore with OW and the Regions, working together with industry and states, to develop an integrated delivery of compliance assistance tools and information. Some challenges are involved in implementing this recommendation. Local officials that currently hand out storm water compliance assistance materials based those materials on state or local government-specific requirements. There is no "one size fits all" set of compliance assistance materials that would serve each state and local jurisdiction. Additionally, the state and local jurisdictions must agree that delivering materials in this manner and requiring evidence of a storm water permit is an approach that they support.

However, in a step toward this activity, OECA is working with OW to develop a CD-ROM with compliance assistance information (see detailed description in previous comment), and both offices will reach out to local offices issuing building permits with these materials in hopes that they will provide them when construction operators come in to apply for permits.

OECA understands that OW recognizes the value in working with local regulators to improve compliance with the NPDES storm water requirements. OW envisions this relationship as providing outreach and oversight opportunities that are difficult at a national and state level. For example, much of the outreach material developed by EPA's Office of Wastewater Management (OWM) is in a format that allows for modification by state/local regulators prior to publication. Additionally, EPA's Office of Wetlands Oceans & Watersheds (OWOW) is

currently developing a website that is to provide a compilation of storm water outreach materials that can be readily downloaded or revised to be used to meet local needs.

Compliance Monitoring

11: Provide Targeting Resources to Regions and States: *Support Regional & State targeting efforts; for example, helping to identify fast-growing areas of the country and their proximity to impaired or pristine waters.*

OECA agrees that it is important to support Regional and State targeting efforts and actively does so in several ways. In the 2003 Storm Water Compliance and Enforcement Strategy, OECA developed two models that it encouraged Regions and States to use for targeting their storm water activities. The first model was focused on a sector approach and included commercial developers of "big-box" stores and large, national residential developers. The second model was a watershed approach where OECA's Office of Civil Enforcement partnered with Region III to develop and implement the Anacostia Watershed Storm Water Enforcement Strategy. Additionally, OECA uses its limited resources to directly support Regional targeting activities by providing contractor assistance for inspections and data reviews. OECA also facilitates communication across the Regions through regularly scheduled monthly conference calls and annual meetings where targeting is often discussed.

OECA and OW are also working to link OW's various water quality databases with OECA's legacy systems through OTIS, the On-Line Targeting Information System, to better identify stormwater facilities that are located near impaired waterways. This linkage will greatly assist OECA and the States in better targeting their compliance assurance activities.

12: Consider Alternative Compliance Monitoring Approach that Provides Greater Compliance Assistance: *Consider development of a customized, on-site compliance assistance effort for small business portions of the construction industry.*

Providing customized, on-site compliance assistance from EPA is difficult, given OECA's resources and the office's longstanding role as a wholesale provider of compliance assistance. EPA's primary role is to encourage the states to work with local agencies to provide compliance assistance.

OECA agrees that greater emphasis should be placed on providing compliance assistance to small construction businesses. It should be recognized that small businesses and sites need to be inspected and subject to enforcement (using the ESO tool where appropriate) in order to ensure an acceptable compliance rate and a level playing field. A major priority for inspection targeting should be responding to legitimate complaints about large and small sites that are received from local officials, particularly regulated municipal separate storm sewer systems (MS4s), which should be supported in their efforts to monitor and control sites within their communities.

Finally, the role of an inspector must consist of observing and reporting circumstances at a particular site with a view to determining the compliance status of the operations at the site. This must be the first priority of the inspection program, although EPA policy does allow inspectors to offer general compliance assistance information relating to applicable requirements. Further,

the EPA Inspector Policy does not preclude inspectors from providing technical or design information if it is regarding a BMP or other written technical information that is already available but can be applied to the specific site. In fact, OECA believes that inspections can create a “teachable moment” where industry may be more receptive to compliance assistance relating to an identified problem. Since the inspection is for the purpose of determining compliance, however, enforcement follow-up may still be appropriate.

Enforcement

13: Use Nature of Non-Compliance Events to Clarify Construction Storm Water

Requirements: Direct attention for compliance assistance efforts or clarification of the requirements to the most commonly found non-compliance events.

OECA agrees that an analysis of the nature of noncompliance and the types of violations most commonly found by inspectors could provide useful insight into the future needs of the regulated community and areas that require better clarification. OECA will explore ways to utilize this information to identify trends for facilities inspected by EPA for potential storm water violations. OECA will also be developing a post-inspection letter that will refer recipients to a portal website that will be used to highlight the best compliance assistance materials at existing websites. For instance, the links will include epa.gov/NPDES and CICA. The portal website will also gauge how effective the post-inspection letter is in getting recipients to use compliance assistance material.

With respect to the clarity of the regulations, OECA believes that the requirements under the storm water permitting program are clearly delineated within the regulations for the NPDES General Permit for Storm Water Discharges From Construction Activities (68 FR 39087). Further, the outreach materials on the EPA NPDES storm water website and the CICA website provide ample details to insure proper compliance. One such resource available on the CICA website is the Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development (the MYER Guide) published by EPA’s Office of Compliance. This assistance is designed to help the construction industry understand which environmental regulations apply to them.

OECA believes that significant factors leading to noncompliance are that workers “on the ground” at sites are either not aware of requirements or have not received sufficient information. Targeting assistance to the most commonly found non-compliance events could be used to target education of site workers on the ground.

Collaboration and Data Sharing

14: Increase Participation by Regions and States in Setting Storm Water Priorities and Developing Multi-Year Strategies: Use the storm water team to expand communication channels to increase Regional and State participation.

OECA agrees that Regional participation is critical and strives to maintain open communication channels. Regions have actively participated in developing and implementing the Performance-Based Strategy. Regions also have on-going dialogues with their states to address all aspects of the storm water program. Additionally, the Regions are involved in every

aspect of OCE's storm water team - their participation is expected on regularly scheduled monthly phone calls (over 100 regional staff on phone call distribution list) and their review and comment is solicited on guidance documents issued by this office (their practical experience and knowledge is acknowledged as critical in the success of this program). In fact, a majority of OECA's guidance documents are driven by Regional recommendations (for example, the revision of the Expedited Settlement Offer policy), as are the agendas for the annual storm water enforcement meeting. The states are asked to join nationally managed storm water cases and have been invited to OECA's training sessions. States also work with the Regions in developing state specific strategies, since the national strategy is a federal strategy that EPA is implementing to better direct the federal resources that EPA controls.